

#### ***4 Official Opinions of the Compliance Board 142 (2005)***

##### **CLOSED SESSION PROCEDURES – WRITTEN STATEMENT – TOPIC DESCRIPTION REITERATING STATUTORY AUTHORITY, HELD TO BE IN VIOLATION**

May 25, 2005

*Jack Murphy, Executive Editor  
The Gazette*

The Open Meetings Compliance Board has considered *The Gazette's* complaint against the Montgomery County Council concerning a closed meeting on October 5, 2004. Specifically, the complaint alleged that the Council failed to provide a sufficient description of the topic to be discussed at the closed session, which involved the Council's efforts to attract an undisclosed business to Montgomery County. The County Council's response, in essence, was that it really could say no more and still preserve the secrecy crucial to promoting the business relocation.

We sympathize with the County Council's dilemma, and in no way do we suggest that the description needed to have specific detail in it. Nevertheless, the Open Meetings Act requires not only a recitation of the statutory exception that a public body invokes but also a separate description of the closed meeting's topic. For a dozen years, our opinions have pointed out that a topic description using the very words of the statute, or an inconsequential paraphrase, does not comply with this statutory requirement. We so hold about the Council's description.

### **I**

#### **Complaint and Response**

Your complaint concerned the adequacy of information disclosed by the Montgomery County Council in advance of a closed meeting held on October 5, 2004, as part of an "official advance addendum to the meeting's agenda." A copy of that document was included with the complaint. The document provided, in relevant part:

PROPOSED CLOSED SESSION to consider a matter  
that concerns the proposal for a business or industrial

organization to locate, expand, or remain in the State pursuant to Maryland Code, State Government Article, §10-508(a)(4). Topic is business relocation.

The focus of the complaint was the final sentence, which was criticized as “uninformative boilerplate.” The complaint noted that, “[i]nasmuch as the statement is a virtual restatement of [§]10-508(a)(4), we believe the sentence constitutes exactly that kind of boilerplate that provides no value to the stakeholders of Montgomery County government.”<sup>1</sup> Attached to the complaint was a letter from Michael Faden, Senior Legislative Attorney, in response to an objection that you had previously lodged with the Council. Explaining the importance of confidentiality in connection with economic development efforts, Mr. Faden described the Council’s statement as providing “as much information as ... practical” and as satisfying “the law’s basic requirements.”

When we submitted your complaint to the Council for a response, we noted that “[a]lthough the complaint refers to ... an agenda addendum, ... [we believe] the proper focus ... should be in connection with the adequacy of the written statement that the presiding officer of a public body is required to complete in advance of a closed session.” We also requested that the Council submit a copy of the written statement to us along with its response.

In a timely response submitted on behalf of the Council, Mr. Faden explained that, “[t]he agenda addendum ... *was* the written statement that the Open Meetings Law requires the Council President to complete before the Council votes to go into closed session. That addendum contained all the information required by ... §10-508(d)(2)(ii) – that is, the reason for closing the meeting, the citation of authority to close the meeting, and the specific topic to be discussed.” The response noted the methods by which the Council makes this document available for the public and indicated that the presiding officer read the statement when the vote to close the meeting was taken. The response further stated that, “while not titled a ‘written statement required by the Open Meetings Law’, [the document] meets all of the law’s specific requirements and serves the purposes for which the law requires a written statement.”<sup>2</sup>

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<sup>1</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>2</sup> The Council’s practice of relying on its agenda in lieu of a separate document seemingly conflicts with the Act’s requirement that the presiding officer complete the written statement immediately before the closed session. As we understand the Council’s practice, however, the presiding officer reads the text of the statement at the time that the vote to close the meeting is taken. Assuming that, if the information in the prepared statement were rendered erroneous due to a motion that differed from the one anticipated,

The response included a copy of the agenda addendum and noted that the “meeting was closed ... to discuss a specific company’s potential move to the County and the extent of County financial assistance to offer that company.”

As to the level of information provided in advance of the closed session, the response argued that the reference to “business relocation” was adequate: “In the context of economic development matters, any greater degree of specificity than the language used ... runs a substantial risk of undermining the purpose of closing the meeting – that is, to review potential public financial assistance without revealing to either the firm under consideration or, more importantly, other jurisdictions with which the County competes to attract and retain business, the fact that the County is close to making an offer to that specific firm.” The response reviewed the Council’s role in approving assistance from the County’s Economic Development Fund and noted that revealing the level of the County assistance under consideration could lead to an applicant’s revising its demands or a competing jurisdiction’s augmenting its offer. Although the Council acknowledged the Compliance Board’s view that “mere parroting of the applicable exception is not acceptable,” the response noted that, in the context of economic developments efforts, “finding an ‘acceptable’ level of detail is challenging at best.” Thus, to fully protect the County’s negotiating position, the Council’s long-standing practice has been to use the sort of broad language to which *The Gazette* objects. “Even using ... a seemingly innocuous descriptive phrase such as ‘high technology firm’ ... could provide the last bit of information that an applicant or competitor needs to confirm that the County is about to make a specific offer.”

In support of the Council’s position, the response cited several Compliance Board opinions recognizing that the level of disclosure in a public statement “need not disclose ‘sensitive’ or ‘confidential’ information when doing so would vitiate the purpose of closing the meeting.”

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the agenda item would be amended accordingly, the Council’s practice satisfies the Act. Nevertheless, we encourage the Council to consider using the form suggested by the Attorney General, which would be completed by the presiding officer at the time of the vote, immediately before the closed session. *See* Office of the Attorney General, *Open Meetings Act Manual* App. C (5<sup>th</sup> ed. 2004). The benefit of using the form is that it results in a separate document as contemplated by the Act, reflecting all the information required under §10-508(d).

## II

### Analysis

Before a public body goes into a closed session permitted under one of the Act's exceptions, the public is entitled to know *why* the public body is closing the meeting, which essentially means a recitation of the applicable exception, and *what* the topic of discussion will be. §10-508(d)(2)(ii). These two elements of disclosure are stated in separate clauses of the statutory provision and are simply not the same thing. The apparent legislative objective is to allow those in attendance to make a rough judgment whether the topic of discussion actually fits within the exception. Someone who thinks it does not is entitled to object to the closing of the session. §10-508(d)(3).

Because invoking an exception and describing the intended topic of discussion are not the same thing, we have consistently held that “the mere parroting” or a rote paraphrase of the applicable exception is not acceptable as a topic description. 4 *OMCB Opinions* 38, 41-42 (2004) (internal citations omitted). Suppose, for example, that a public body closes a meeting, as §10-508(a)(1) allows it to do, to discuss a specific personnel matter. If the public body simply describes the topic of the meeting as “personnel,” it has effectively omitted the topic description, for the public knows nothing more than it already knew by the citation of the exception alone. *See, e.g.*, 3 *OMCB Opinions* 335, 338 (2003) (Opinion 03-17) (use of two cryptic words, “personnel positions,” as describing topic of closed meeting under personnel exception was insufficient); 3 *OMCB Opinions* 101, 103 (2001) (Opinion 01-6) (description consisting of “negotiations” and “personnel” inconsistent with requirements of the Act).

If telling the public nothing about the topic is legally insufficient, telling them too much is assuredly not legally required. By “too much” we mean “a level of detail that would defeat the desired confidentiality underlying the closed session ....” 4 *OMCB Opinions* 38, 41-42 (2004) (internal citations omitted). In particular, we recognize the sensitivity of a public body's discussion of a particular economic development effort at a time when the government may be in sensitive negotiations as well as competing with other jurisdictions – a concern that was well-articulated in the Council's response. Hence, we agree with the Council that it need not reveal the name of the business entity, the nature or level of the financial assistance being considered to lure the business, or other specific information that could reasonably be foreseen as disadvantageous to the County's negotiating position.

In short, there is a continuum between an empty description and an excessively specific one. The Council's description, “business relocation,” a cryptic

paraphrase of the applicable exception, fell short.<sup>3</sup> The Council could have avoided undue specificity and yet complied with the obligation to describe the topic had it, for example, disclosed in the statement what it later said to us: that the “meeting was closed ... to discuss a specific company’s potential move to the County and the extent of County financial assistance to offer that company.” This description, while still quite general, at least would allow a reasonable observer at the meeting to say, “Ah, yes, I understand why this topic seems to fit within the exception.” And enabling observers to understand is, after all, a worthy objective of the Act.

### **III**

#### **Conclusion**

We find that the Montgomery County Council, although undoubtedly justified in closing its meeting on October 5, 2004, to discuss a business relocation matter, failed to comply with the Act’s procedural requirement for a separate and distinct (albeit not necessarily specific or detailed) description of the “topic to be discussed” in advance of its closed meeting.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim, Jr.*  
*Courtney J. McKeldin*  
*Tyler G. Webb, Esquire*

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<sup>3</sup> The Council’s response also included a copy of its minutes of October 5, 2004, that included a summary of the closed session held that date:

SUBJECT: Closed Session

ACTION: Agreed to meet in closed session to consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State.

Councilmember Perez made the motion. Councilmember Subin was temporarily absent.

The County Council convened in the County Council Room in closed session from 4:47 P.M. until 4:53 P.M. under authority of Section 10-508(a) (4) ... The topic was business relocation.

For the same reason discussed above, the vague description provided also fails to satisfy §10-509(c)(2)(iv).